No. 11548

In the United States Circuit Court of Appeals for the Ninth Circuit

STIMSON MILL COMPANY, A CORPORATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

SEWAL KEY,
Acting Assistant Attorney General.
HELEN R. CARLOSS,
CARLTON FOX,
Special Assistants to the Attorney General.

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OPINION BELOW

The only previous opinion is that of the Tax Court (R. 21–40), which is reported in 7 T. C. 1065.

JURISDICTION

The petition for review seeks special relief from the excess profits tax imposed by Subchapter E of Chapter 2 of the Internal Revenue Code for the taxable year 1942, to the extent of approximately $12,000. (R. 41–53.) The petitioner herein, Stimson Mill Company, hereinafter called the taxpayer, is a Washington corporation, with its principal office at Seattle, Washington, and for the taxable year in question filed its income and excess profits tax returns with the Collector of Internal Revenue for the District of

Washington, at Tacoma, Washington. (R. 22.) The Commissioner duly determined a deficiency in the taxpayer's excess profits tax for the taxable year in the sum of $2,106.08, and the taxpayer filed a timely application for relief under Section 722 of the Code, claiming a refund of excess profits tax for that year, and filed the same with the Commissioner of Internal Revenue in Washington, D. C., on December 26, 1944. (R. 22–23.) The Commissioner determined that the taxpayer was not entitled to any relief under Section 722, and notice of disallowance of the taxpayer's claim for such relief was issued in accordance with the requirements of Section 732. (R. 22–23.) Within ninety days thereafter the taxpayer filed a petition with the Tax Court under Section 732 for a redetermination of its claim for such relief.[1] (R. 3–12.) The decision of the Tax Court on review of the special division thereof under Section 732, affirming the Commissioner's determination disallowing the claim, was entered November 1, 1946. (R. 41.) The petition for review by this Court was filed January 28, 1947, allegedly under the provisions of Sections 1141 and 1142. (R. 42.) The respondent Commissioner challenges the jurisdiction of this Court to review such determination under Sections 1141 and 1142, or at all, because of the provisions of Section 732 (c) which prohibit review of the Tax Court's determina-

[1] The assertion of the taxpayer (Br. 1–2) that its petition for review of the Commissioner's denial of Section 722 relief was filed under Section 272 of the Code, as well as under Section 732, is pointless. For, obviously, the only section granting the taxpayer any right of review of such decision is Section 732.

tion of any question necessary solely under Section 722, as is the question in the instant case. The Commissioner accordingly moves this Court to dismiss the taxpayer's petition herein for want of jurisdiction to review the Tax Court's decision in this proceeding, in view of the provisions of Section 732 (c).

QUESTION PRESENTED

Whether this Court has jurisdiction to review a determination by the Tax Court that the taxpayer was not entitled to relief under Section 722 of the Internal Revenue Code from its excess profits tax liability imposed under Subchapter E of Chapter 2 of the Code, in view of the provisions of Section 732 (c) thereof prohibiting review by any court of the Tax Court's determination of any question necessary solely by reason of Section 722.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the statutes and regulations involved are contained in the Appendix, *infra*.

STATEMENT

All of the facts were stipulated, and the Tax Court adopted the stipulation of facts as its findings of fact. Such stipulation is as follows, except that the word "petitioner" has been changed to "taxpayer" (R. 22–27):

> 1. The taxpayer is a corporation organized under the laws of the State of Washington, with its principal office at * * * Seattle, Washington. Taxpayer's income and excess profits tax returns for the * * * year 1942

* * * were filed with the Collector of Internal Revenue for the District of Washington, at Tacoma, Washington. (R. 22.)

2. The taxpayer made a timely "Application for Relief Under Section 722 of the Internal Revenue Code" (Form 991) claiming a refund of excess profits tax for the taxable year 1942, which claim was filed with the Commissioner of Internal Revenue at Washington, D. C. (R. 22.)

3. Taxpayer's excess profits tax return (Form 1121) for the taxable year 1942 disclosed a total liability for excess profits tax in the amount of $249,262.34, which has been assessed. Thereafter, the Commissioner issued a statutory notice dated December 26, 1944, * * * in which it was determined that there was an additional liability in excess profits tax for said year in the amount of $2,106.08, making a total liability for said year of $251,368.42. (R. 22–23.)

4. In determining the liability for excess profits tax for the year 1942, the Commissioner also determined in the statutory notice dated December 26, 1944, that the taxpayer is not entitled to any relief under section 722 of the Internal Revenue Code. Accordingly, the claim for refund asserted in taxpayer's application for relief (Form 991), was disallowed for the year 1942 and notice of such disallowance was issued in accordance with the requirements of section 732 of the Internal Revenue Code. (R. 23.)

5. In computing its excess profits tax, the taxpayer is entitled to use an excess profits tax credit based upon net earnings within the "base

period years'' 1936 through 1939, in accordance with section 713 of the Internal Revenue Code, as amended. (R. 23.)

6. In determining the liability of the taxpayer for excess profits tax for the year 1942, * * * the respondent has computed an excess profits credit based upon the actual average base period net income computed under section 713 (e). Under the provisions of section 713 (e) (1) the benefits of the so-called 75% rule, which automatically increased excess profits net income for the year 1938, were secured to the taxpayer. The excess profits credit using said actual income in accordance with the notice of deficiency attached to the petition, is in the amount of $78,662.68, computed as follows (R. 23–24):

Year	*Actual base period net income*
1936	$89,422.67
1937	63,706.57
1938	38,127.75
1939	111,839.77
Aggregate for four base-period years	303,096.76
	Adjustment under section 713 (e) (1) of Code
Aggregate of 1936, 1937 and 1939	$264,969.01
75% of ⅓ for 1938	66,242.25
Total	331,211.26
Average	82,802.82
Excess-profits credit 95%	78,662.68

7. Taxpayer has established by the information submitted that its normal operation or output was interrupted in the year 1937 by strikes or other events peculiar in its experience, as provided by section 722 (b) (1), I. R. C. It

has also established that because of those events the actual earnings for 1937 in the amount of $63,706.57 were abnormally low. On the basis of the facts submitted, the fair and just amount representing normal earnings which would be used by the taxpayer as its constructive average base period net income under the provisions of section 722 (exclusive of section 713), for the year 1942 would be determined after reconstructing earnings for the year 1937 (prior to taxes) from the actual amount of $63,706.57 to the reconstructed amount of $85,263.34. The taxpayer is not entitled to any other or further constructive adjustments to actual earnings in the remaining base period years 1936, 1938 and 1939 under section 722 of the Code as presently constituted. (R. 24–25.)

8. The taxpayer, pursuant to its duly filed applications for relief under section 722, I. R. C., for the taxable years 1940 and 1941, established by information submitted that its normal operation or output was interrupted in 1937 by strikes or other events peculiar in its experience, as provided by section 722 (b) (1), I. R. C. With respect thereto the same determination was made as to 1937 and as to the excess profits credit after the application of section 722, as set forth in paragraph (7), above. However, the excess profits credit of $77,105.22 so determined was greater than the excess profits credit under section 713, which was used by the taxpayer in its returns for 1940 and 1941 in the computation of its excess profits tax for said years for the reason that the provisions of section 713 (e) (1) were not applicable with respect to such years. Accordingly, the taxpayer was allowed an in-

crease in its excess profits credit and corresponding tax benefits for 1940 and 1941 by reason of the application of section 722. (R. 25.)

9. If, as taxpayer contends, the corporation is entitled under the law to compute its excess profits credit for the year 1942 by reconstruction of its base-period income under section 722 as set forth in paragraph 7 of the stipulation, and also by application of the provisions of section 713 (e) (1) of the Code, the excess profits credit to be used in determining its excess profits tax liability for said year is the amount of $85,062.34, computed as follows (R. 25–26):

Year	*Base period net income reconstructed under section 722*
1936	$89,422.67
1937	85,263.34
1938	38,127.75
1939	111,839.77
Aggregate for four base-period years	324,653.53

	Adjustment under section 713 (e) (1) of Code
Aggregate of 1936, 1937, and 1939	$286,525.78
75% of ⅓ for 1938	71,631.44
Total	358,157.22
Average	89,539.31
Excess profits credit 95%	85,062.34

10. Taxpayer does not contest the proposed deficiency in excess profits tax as set forth in the statutory notice, except by reason of its claim that it is entitled to relief under section 722 of the Code in addition to the benefits provided by section 713 (e) (1). Accordingly, it is agreed that the proposed deficiency in the amount of $2,106.08 as set forth in the statu-

tory notice dated December 26, 1944, is due and has been properly assessed by the respondent since the petition was filed. (R. 26.)

11. If it is held, in accordance with the respondent's determination in the statutory notice, that taxpayer is not entitled to relief under section 722 in addition to the benefits allowed by section 713 (e) (1) of the Code, then this Court may enter its decision that there is no further deficiency in excess profits tax due from, or overpayment in such tax due to, the taxpayer for the year 1942, and that taxpayer's correct liability in excess profits tax for said year is in the amount of $251,368.42. (R. 26–27.)

12. If it is held, in accordance with the taxpayer's contention in this proceeding, that the taxpayer is entitled to compute its excess profits credit for the taxable year 1942 using both sections 722 and 713 (e) (1) of the Code, then it is agreed that taxpayer's excess profits tax credit is to be computed in the manner specified in paragraph 9 of this stipulation, above, and that taxpayer has overpaid its excess profits tax for said year in an amount to be determined in accordance with a recomputation of liability under Rule 50 of The Tax Court's Rules of Practice. (R. 27.)

SUMMARY OF ARGUMENT

Under Section 732 (c) of the Internal Revenue Code, this Court is without jurisdiction to review the decision of the Tax Court in this case, for the question which the Tax Court decided was one arising solely by reason of Section 722.

A. The Tax Court sustained the Commissioner's denial of Section 722 relief from the excess profits tax imposed by Subchapter E of Chapter 2 of the Internal Revenue Code. In so doing, it rejected the taxpayer's contention that in constructing its base period net income under Section 722 (a) and (b) (1), the adjustment made therein for the purpose of computing the credit under Section 713 (e) (1) in determining the tax without regard to Section 722 relief should have been reflected. The scheme of the statute is to tax at high rates all profits above a statutory norm represented by the average of the actual net income of the taxpayer during the base period years 1936 to 1939, inclusive. In this case, the credit was determined under Section 713 (e) (1). The taxpayer claimed and was allowed the credit determined under Section 713 (e) (1) in computing tax under Subchapter E. No appeal was taken by it from the Commissioner's deficiency determination in excess profits tax, which reflected such allowance, and it is stipulated that such deficiency is due. Therefore, the only possible relief from the tax is under Section 722. Section 722 (a) provides that when the taxpayer establishes that the tax is excessive or discriminatory, and the extent thereof, a constructive average base period net income is to be used instead of the average base period net income as otherwise computed under Subchapter E. In this case, only the construction of the taxpayer's base period net income in the year 1937 was required, because only in that year were there abnormalities, such as are listed in Section 722 (b). Section 722 relief was

nevertheless denied because the taxpayer's constructive average base period net income determined under Section 722 was less than its average base period net income determined under Section 713 (e) (1). However, it would not have been, if, as the taxpayer contends, the adjustment made in the taxpayer's net income under Section 713 (e) (1) in the base period 1938 year were reflected in the constructive base period net income under Section 722 (b) (1). The taxpayer's statement of the problem in the form of a claim for a Section 713 (e) (1) credit, reflecting the Section 722 construction of its base period net income does not alter the fact that there is here involved only the question whether the Section 722 construction should reflect the Section 713 (e) (1) adjustment. There can be no recomputation of the Section 713 (e) (1) credit, for Section 722 (d) expressly provides that the excess profits tax shall be determined and paid without benefit of Section 722, and the applicable decisions so hold. Hence, the appeal here is not justifiable under Section 1141, upon which the taxpayer relies, but is prohibited under Section 732 (c), because the determination of the question is one necessary solely under Section 722. The taxpayer's attack on the regulations, which require the Section 722 construction without reflecting the 713 (e) adjustment, is pointless. Nor was the Commissioner or the Tax Court performing a purely ministerial duty in determining that the taxpayer was not entitled to Section 722 relief. If this were true, the taxpayer's remedy would be by mandamus to

compel the performance of such duty, in which case, however, neither the Commissioner's nor the Tax Court's construction of Section 722 would be subject to review, any more than it is subject to review here. The instant proceeding is, however, not one to compel the performance of such a duty.

B. This Court is not required to construe Section 722; but, in any case, Section 722 may, and therefore must, be so construed as to implement the purpose of Congress, as expressed in Section 732 (c), to give finality to the Tax Court's disposition of claims for Section 722 relief.

1. The Regulations prohibiting the use of Section 713 (e) adjustment in the construction of the taxpayer's base period net income under Section 722 support the Government's construction of Section 722. These Regulations are reasonable and cannot be cast aside even if another view of the construction of the section were tenable.

2. In its opinion the Tax Court has demonstrated that the average base period net income under Section 713 is a concept limited to the purposes of that section only, no statutory authority appearing for applying the same concept in conection with the relief afforded by Section 722.

3. Congress did not and could not have intended the Section 713 (e) (1) adjustment of the taxpayer's base period net income to become a factor in the construction of such income under Section 722, because such method of applying Section 722 does not establish the "fair and just amount representing normal earnings"

to be used as a "constructive average base period net income" under Section 722, as required by subsection (a) thereof. Contrary to the taxpayer's contention, there must be a comparison between the two. In other words, the average base period net income as adjusted under Section 713, must be placed in juxtaposition with what its normal earnings would have been, if abnormalities in its actual income of the kind mentioned in Section 722 (b) had not existed.

ARGUMENT

Under Section 732 (c) of the Internal Revenue Code, this Court is without jurisdiction to review the decision of the Tax Court in this case

A. The question whether the adjustment made in the taxpayer's net income for the base period year 1938 under Section 713 (e) (1) of the Code must be used as a factor in the construction of its base period income under Section 722 (a) of (b) thereof, involves the determination and a question necessary solely by reason of Section 722, within the meaning of Section 732 (c)

By its decision, the Tax Court sustained (R. 40) the Commissioner's denial (R. 23) of the taxpayer's claim to relief from the excess profits tax for the taxable year 1942, under the provisions of Section 722 (a) and (b) of the Internal Revenue Code (Appendix, *infra*) (R. 22). The taxpayer seeks review at the hands of this Court of the Tax Court's decision on the ground that it misinterpreted Section 722 (a) and (b), in that it refused to use the adjustment made in the taxpayer's net income for the base period year 1938 under Section 713 (e) (1) (Appendix, *infra*), as a factor in the construction of its base period net income under Section 722. The Commissioner contends

that the taxpayer's claim for relief under Section 722 involves the determination of a question necessary solely by reason of that section, within the meaning of Section 732 (c) (Appendix, *infra*), which provides that the determination of such question shall not be reviewed or determined by any court or agency except the Board of Tax Appeals, now the Tax Court.

Briefly, the scheme of the excess profits tax statute (Subchapter E of Chapter 2 of the Code) is to tax at high rates all profits above a statutory norm. This is accomplished by a credit based upon the average of the actual net income of the taxpayer for the period selected as normal (namely the four years, 1936 to 1939, inclusive), computed with a possible adjustment under Section 713, or a percentage of invested capital computed under Section 714, whichever produces the lower tax. Congress, however, recognized that, if this method of computing income subject to excess profits tax were left as an inflexible yard-stick, excessive and discriminatory taxes would result in the case of many corporations whose base period earnings were not representative of their normal earnings, because of various abnormalities occurring in the base period. It was because of this fact that Congress enacted Section 722, the provisions of which are hereafter more fully explained.

It suffices here to say that Section 722 is a relief provision. In this respect, it is similar to Section 721, which this Court had under consideration in the case of *James F. Waters, Inc.* v. *Commissioner,* decided March 19, 1947 (1947 C. C. H., par. 9196). It is de-

signed to give taxpayers relief from the excess profits tax imposed by Subchapter E in certain so called hardship situations, by way of an excess profits credit based on a constructive average base period net income in lieu of the average base period net income of the taxpayer otherwise determined under Subchapter E, or more specifically in this case under Section 713 (e) (1), as stated. Section 722 is superimposed, as it were, upon those sections of Subchapter E which provide for the determination of the excess profits tax, including, of course, Section 713 (e) (1). As hereinafter more fully explained, Section 722 cannot, and does not, come into play until the amount of the tax has been determined and paid and application for relief under the section has been made to the Commissioner by way of a claim for refund of the tax, in all or in part, pursuant to the provisions of Section 732 (a) (Appendix, *infra*).

It is for this reason that, contrary to the taxpayer's contention (Br. 79–80), the relief sought may be analogized—as, indeed, this Court did in the *Waters* case, *supra,* to the case of Section 721 relief—to the grant of relief by way of special assessment from the 1918 excess profits tax. There, also, the relief sections were superimposed upon the excess profits tax provisions, and the grant of relief thereunder was likewise made to depend upon the exercise of both judgment and discretion on the part of the Commissioner. Moreover, the statute there, as here, generally authorized review of the Commissioner's determination by the Board of Tax Appeals, though, unlike in the case

of the excess profits here involved, there was no express provision in the earlier Acts denying judicial review in special assessment cases.[2]

As originally enacted by Section 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974, Section 722 of the Code contained but five lines and gave the Commissioner plenary power to adjust abnormalities affecting either income or capital, subject to review by the Board of Tax Appeals. It was considered at the time, however, that the section as then enacted was merely a stop-gap provision, written in the most general terms pending a study by the staffs of the Treasury and the Joint Committee on Internal Revenue Taxation, and consultation with taxpayers and tax practitioners, with a view to formulating a more prac-

[2] In denying the courts the power to review the Board's determination in these cases, the Supreme Court held that no challenge could be made thereof in the courts, except for fraud or other irregularities. *Williamsport* v. *United States*, 277 U. S. 551, 561; *Heiner* v. *Diamond Alkali Co.*, 288 U. S. 502; *Duquesne Steel Foundry Co.* v. *Commissioner*, 41 F. 2d 995 (C. C. A. 3rd) affirmed *per curiam*, 283 U. S. 799, on the authority of *Williamsport Co.* v. *United States*, *supra; Welch* v. *Obispo Oil Co.*, 301 U. S. 190. Nor can there be doubt any longer that, in the absence of fraud or other irregularities, neither the determination, nor the factors used in computation, nor the result itself, is open to review. The determination cannot be judicially reviewed, however the problem may be stated, or upon what reasoning its solution may be sought. *Cleveland Automobile Co.* v. *United States*, 70 F. 2d 365, 368 (C. C. A. 6th), certiorari denied, 293 U. S. 563. It is to be noted that in these cases both *nisi prius* reviews of the Commissioner's determination and appellate reviews of such lower court decisions were involved, as well as reviews by appellate courts of decisions of the Board of Tax Appeals under both the 1924 Act, which provided that they were to be regarded as *prima facie* correct, and under the 1926 Act which provided that they should be final.

tical version for relief.[3] Accordingly, the provisions of Section 722 were extensively amended by Section 6 of the Excess Profits Tax Amendments of 1941, c. 10, 55 Stat. 17. These amendments were by Section 17 thereof made effective as of the date of the Excess Profits Tax Act of 1940, being Section 201 of the Second Revenue Act of 1940, above mentioned, which, as stated, contained the original Section 722. The provisions of Section 722 were again amended by Section 222 of the Revenue Act of 1942, c. 619, 56 Stat. 798, and, as so amended, were made applicable to all years subsequent to December 31, 1939. It is the provisions of Section 722 as thus amended that are applicable here.[4]

As indicated, the taxpayer claimed an excess profits credit for the taxable year 1942 computed under Section 713 (e) (1). Thus, since its actual net income in the base period year 1938 was less than 75% of its actual net income for the remaining base period years, 1936, 1937 and 1939, it adjusted its average base period net income under the provisions of that section by substituting the amount of $66,242.25 (being 75% of its average net income in the taxable years 1936, 1937 and 1939), for its actual net income in 1938 of $38,127.75.

[3] See H. Conference Rep. No. 3002, 78 Cong., 3d Sess., p. 52 (1942–2 Cum. Bull. 548), as also Internal Revenue Bulletin on Section 722, Internal Revenue Code for November, 1944, p. 1.

[4] Various subsections of Section 722 were thereafter amended by Section 1 of the Act of March 31, 1943, c. 31, 57 Stat. 56; by Section 2 (b) of the Act of December 17, 1943, c. 346, 57 Stat. 601, and by Section 206 of the Revenue Act of 1943, c. 63, 59 Stat. 21. But by Section 122 (a) of the Revenue Act of 1945, c. 453, 59 Stat. 556, the excess profits tax provisions were made inapplicable for taxable years beginning after December 31, 1945.

As a result, the taxpayer's average base period net income was determined under that section in the amount of $82,802.82, and its excess profits credit at 95% thereof or in the amount of $78,662.68. (R. 23–24.)

Though the Commissioner allowed the credit as thus computed, and determined a deficiency in excess profits tax of $2,106.08 under Subchapter E, which reflected such credit (R. 22–23), no appeal was taken therefrom by the taxpayer. No question of the allowance of such credit against its adjusted excess profits tax net income, as computed under the provisions of Subchapter E, or as to the resultant deficiency in the tax determined by the Commissioner, as stated, was or could have been raised in the Tax Court in this proceeding for relief under section 722, and it is not and could not be raised here. Accordingly, the stipulation of the parties contains an agreement to the effect that the proposed deficiency is due and that it was properly assessed by the respondent. (R. 26.) That being so, the only relief from the tax admittedly correctly determined and due, which the taxpayer sought, or which it could have obtained, was under the provisions of Section 722. Thus it was further stipulated and found by the Tax Court that the taxpayer timely filed an application for relief under Section 722 (d) (Appendix, *infra*), on the form provided for that purpose, claiming a *refund* of excess profits tax. (R. 22.) It will be noted that Section 722 (d) provides that the claim must be filed within the period prescribed by Section 322, which is the refund and credit section, subsections (a) and (b) (1) of which (Appendix, *infra*), in com-

bination, provide for the filing of a claim for refund of income, war profits, or excess profits tax, within three years from the time the return was filed, or within two years from the time the tax was paid.

As stated, Congress recognized that the yard-stick for measuring average base period net income as provided in Section 713 might not be an adequate standard of normal earnings, with the result that the excess profits credit computed under Section 713 would not suffice to remove such earnings from the tax. Accordingly, in the case of a taxpayer entitled to use the excess profits credit based on base period net income, Section 722 (a) provides that, if the taxpayer establishes (1) that the tax so computed results in an "excessive and discriminatory" tax, and (2) what would be a fair and just amount representing normal earnings of the taxpayer in the base period, to be used as a *constructive* average base period net income in lieu of its average base period net income "otherwise determined under this subchapter"—that is to say here under Section 713 (e) (1)—it shall in computing its excess profits tax, be entitled to use the constructive base period net income, determined under Section 722, instead of the average base period net income, as otherwise computed, as aforesaid. Thus, if the constructive average base period net income as established under Section 722 is greater than the average base period net income computed under Section 713, the credit is likewise greater, with the result that the adjusted excess profits net income subject to excess profits tax is reduced, and consequently also the tax.

Relief is then obtained, as stated, under Section 722 (d) by way of refund or credit. See *Uni-Term Stevedoring Co.* v. *Commissioner,* 3 T. C. 917, 919.

What constitutes an excessive and discriminatory tax is defined by Section 722 (b), which in this respect provides that the tax shall be considered to be excessive and discriminatory only if the taxpayer's average base period net income, as computed under Section 713, is an inadequate standard of normal earnings because of factors, circumstances, or occurrences specified in Section 722. Such factors are: (1) An interruption or dimunition of production during the base period; (2) depression in the taxpayer's business during the base period, due to temporary economic events or conditions generally prevailing in the particular industry of which the taxpayer's business was a part, which subjected it to a different profit cycle or to sporadic and high production profits, and (3) depression in the taxpayer's business resulting from any factor affecting its business, which might reasonably be considered as resulting in an inadequacy of normal earnings during the base period.

The Tax Court sustained the Commissioner's denial of the taxpayer's application for Section 722 relief, even though the Commissioner had constructed its net income for the year 1937 under the provisions of Section 722. The Commissioner constructed such income under that section to the extent of increasing it from $63,706.57 to $85,263.34, because he determined that the taxpayer's normal production or output in 1937 was interrupted by strikes or other events peculiar in

its experience necessitating such construction. Section 722 relief was nevertheless denied because the amount of the taxpayer's constructive average base period net income as determined under Section 722 was less than the amount of the average base period net income as determined under Section 713 (e) (1).

In sustaining the Commissioner's determination in this respect, the Tax Court rejected the taxpayer's contention that, in constructing its base period net income under Section 722 (a), the adjustment made in the taxpayer's actual net income for 1938 under Section 713 (e) (1) should be taken into consideration. In final analysis, the taxpayer's sole point here is that the Tax Court's rejection of such contention was erroneous.

It is quite true that before the Tax Court, as well as throughout its entire brief here, the taxpayer attempted to put the problem in a different form, by contending that, in computing its income for 1938 under Section 713 (e) (1) it was entitled to use the amount of $85,263.34, representing its 1937 net income as reconstructed by the Commissioner under Section 722 (a). And it is only on the theory that it is seeking a readjustment of its credit computed under Section 713 (e) (1) that the taxpayer professedly invokes the provisions for review of the Commissioner's deficiency determinations, granted this Court by Section 1141 of the Code. For, manifestly, so far as concerns its claim for relief under Section 722, as such, any right which the taxpayer may have to a review thereof is limited by Section 732 to a review by the Tax Court.

As the Tax Court said in its opinion (R. 33)—

> The statute does not permit computation under section 713 (e) (1) by using, for any base period year, not the actual income, but an income reconstructed under section 722 (a).

The Tax Court based this conclusion upon an analysis of Section 713 (e) (1) which it then proceeded to make. (R. 33–34.) Such analysis speaks for itself, and need not be repeated here. We desire, however, to point to an additional reason why the taxpayer would in no event be entitled to the hybrid credit which it has computed under Section 713 (e) (1), by the interpolation therein of its constructed base period net income under Section 722. (R. 26.)

This is that Section 722 (d) expressly prohibits the application of Section 722 in the computation of the excess profits tax, whether the excess profits credit computed under Section 713 or Section 714. In this connection, Section 722 (d) provides that the taxpayer shall compute its tax, file its return, and pay the tax shown thereon, without application of Section 722, and this requirement applies not only to the tax shown upon the return (see *Uni-Term Stevedoring Co.* v. *Commissioner, supra; Pioneer Parachute Co.* v. *Commissioner,* 4 T. C. 27; *Blum Folding Paper Box Co.* v. *Commissioner,* 4 T. C. 795; *Ceco Steel Products Corp.* v. *Commissioner,* 150 F. 2d 698 (C. C. A. 8th)), but to a deficiency therein determined by the Commissioner (*American Coast Line, Inc.* v. *Commissioner,* 159 F. 2d 665 (C. C. A. 2d)).

Beyond peradventure, therefore, a statement of the problem in the form of an alleged error on the Tax

Court's part in failing to allow the taxpayer a credit, computed after the allowance of Section 713 (e) (1) adjustment for 1938 which reflects therein the construction of its 1937 income under Section 722 (a), does not serve to alter the fact that the determination of the question here presented is one solely by reason of Section 722, within the meaning of Section 732 (c). But, as stated at the onset of our argument, that section prohibits review of that question here. See *James F. Waters, Inc.* v. *Commissioner, supra.*

If there were any doubt that the only question presented by the taxpayer for review here is one of the construction of Section 722, it is wholly dispelled by the fact that the taxpayer, itself, states (Br. 56–64) the question in terms of its challenge of the validity of the Commissioner's regulations promulgated under Section 722, namely Section 35.722–2 of Regulations 112. These provide, in effect, that in computing the amount of the taxpayer's constructive average base period net income under Section 722, in those cases in which that section is applicable, it is not entitled to use the rules provided by Section 713 (e) (1), relating to the increase of base period net income of lowest year of base period, and that, since the taxpayer's constructive base period net income is the just and fair amount representing normal earnings and will reflect adjustments for abnormally low base period years, a taxpayer having computed such amount is not entitled in addition to apply rules provided by Section 713 (e) (1).

The taxpayer's contention is not that Congress could not have denied Section 713 (e) (1) relief in con-

nection with a grant of Section 722 relief. It contends merely that Congress did not do so, but to the contrary granted such relief, and that the regulations are contrary to the meaning of Section 722 and defeat its purpose. Obviously, the taxpayer's contention that the regulations are legislative in character and, therefore, violate Article 1 of the Constitution adds nothing to its contention that they are contrary to the statute. The Regulations either correctly interpret Section 722, or they do not, and whether they do or not is, as stated, a question with which this Court will not concern itself any more than it will concern itself with the question as to whether or not there is factual basis for denying the taxpayer Section 722 relief. The Tax Court's determination is equally final in both instances.

Moreover, if, as the taxpayer contends (Br. 75–77), the function of the Commissioner in the circumstances here has been reduced to the performance of a mere ministerial duty, concerning which no determination by him was necessary, it is apparent that the taxpayer's only remedy is mandamus to compel the Commissioner to perform such duty. Section 732 (c) does not purport to protect either the Commissioner, or for that matter the Tax Court, in failing to perform such duty. In such event, however, interpretation of the law is not subject to review, *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316, 324–325. As was said by the Court of Appeals for the District of Columbia in *Hammond* v. *Hull,* 131 F. 2d 23, 25:

> When the performance of official duty requires an interpretation of the law which governs that performance, the interpretation

> placed by the officer upon the law will not be interfered with, certainly, unless it is clearly wrong and the official action arbitrary and capricious. For it is only in clear cases of illegality of action that courts will intervene to displace the judgments of administrative officers or bodies. Generally speaking, when an administrative remedy is available it must first be exhausted before judicial relief can be obtained, by writ of mandamus or otherwise.

But the proceeding here is neither in form nor in substance one to compel either the Commissioner or the Tax Court to perform a ministerial duty. Neither the Commissioner nor the Tax Court has refused to consider the taxpayer's claim for relief. Both have considered and disposed of it upon due consideration of the facts presented to them and the application of the pertinent statute and Regulations thereto. There is nothing left for the Tax Court to do, and nothing for the Commissioner but to carry its order into effect, if, indeed, he has not already done so. The only question which it is sought here to review is whether the Tax Court erred in its application of the law and Regulations to the facts. And, as has repeatedly been said, Section 732 (c) prohibits that.

B. Section 722 may, and therefore must, be so construed as to implement the purpose of Congress, as expressed in Section 732 (c), to give finality to the Tax Court's disposition of claim for Section 722 relief

So far we have undertaken to show that, regardless of the interpretation placed on Section 722 by the Commissioner and the Tax Court, this Court is without jurisdiction under Section 732 (e) to review the disposition which the Tax Court made of the tax-

payer's claim to Section 722 relief. The reason is that whatever the correct interpretation of Section 722 may be, the decision of the Tax Court involves only the determination of a question necessary solely by reason of Section 722, and its decision is final. It is our view that this Court is not called upon to interpret that section. See *James F. Waters, Inc.* v. *Commissioner, supra.* In order, however, to remove all possible doubt that the Tax Court's decision involves only such a question, we shall demonstrate that Section 722 can properly be construed as being totally independent of Section 713 (e) (1) and it should be so construed in order to implement, rather than to defeat, the purpose of Congress expressed in Section 732 (c) to give finality to the Tax Court's disposition of the taxpayer's claim to Section 722 relief.

The involved argument which the taxpayer makes in support of its objection to the Tax Court's construction of Section 722 is not convincing and does not, in any event, justify detailed analysis. An over-all answer should suffice to dispose of it. Such answer will be found, first, in the administrative interpretation of Section 722; second, in a consideration of Section 713; and finally in a consideration of Section 722, itself. We consider these in the order stated.

In passing, it should be stated, however, that the very foundation of the taxpayer's position here involves a contention, made not only in its so-called "Statement of the Case" (Br. 7–11), but in the third point of its argument (Br. 33–38), which is without statutory support whatever. The contention is that, under Section 722 as amended by Section 6 of the

Excess Profits Tax Amendments of 1941, and particularly under Paragraph 3 of Section 722 (b), as amended, relating to the rules of construction of Section 722 (a), the average base period net income computed under Section 722 (a) must be determined in accordance with its computation under Section 713, and that the amendments made by Section 222 of the Revenue Act of 1942 in the cognate provisions of Section 722 were not intended to and did not change this requirement. The fact of the matter is, however, that the amendments made by the Revenue Act of 1942 in Section 722, particularly in subsection (e) thereof, relating to the rules for the application of the section, entirely omitted the requirement that the constructive average base period net income computed under Section 722 (a) be determined in accordance with the computation of the average base period net income under Section 713. Nor is there anything in the committee reports, the taxpayer's contention to the contrary notwithstanding, which justifies its contrary conclusion.

1. As was pointed out in subpoint A, *supra,* Section 35.722–2 (b) (1) of Regulations 112, as amended by T. D. 5415, 1944 Cum. Bull. 404 (Appendix, *infra*), specifically provides that the Section 713 (e) (1) adjustment of the taxpayer's base period net income shall not be reflected in a constructive average base period net income computed under the provisions of Section 722.

At the outset, it should be stated that the taxpayer's contention (Br. 61–62), that the original Regulations allowed the constructive average to be computed as

provided by Section 713 (e) (1), is incorrect. For all that these Regulations provided was that the Commissioner might, in a proper case, take the principles of both Section 713 (e) (1) and Section 713 (f) into account, and then only to the extent that he deemed the application of such principles to be reasonably consistent with the conditions and limitations of Section 722 and of such sections. We submit that there is nothing in the unamended Regulations which justifies a conclusion that he might under any circumstances have been compelled to take the 75% adjustment provided for by Section 713 (e) (1) into account in the construction of the taxpayer's base period net income, under Section 722. We turn then to a consideration of the amended Regulations.

In its opinion (R. 31), the Tax Court said that the taxpayer had stated that its case must stand or fall on the validity of the Regulations. The Tax Court considered them as embodying not only a reasonable, but a correct, interpretation of the statute. It undertook to demonstrate this, both from the standpoint of the application of Section 713 (e) (1) in the determination of the taxpayer's excess profits tax income and the excess profits tax laid in respect thereof (R. 33–37), to which we have already referred in our subpoint A, and from the standpoint of the application of Section 722 in the grant of relief therefrom (R. 37–40).

It is, of course, well settled that a regulation cannot be struck down unless it is clearly an erroneous interpretation of the statute. The question is not whether the administrative determination is free from doubt,

but whether it is a reasonable one. Thus, even if another conclusion as to the legislative purpose could properly be reached, the regulation should not be cast aside, for it may be ignored only if unreasonable or inconsistent with the statute. *Brewster* v. *Gage,* 280 U. S. 327; *Fawcus Machine Co.* v. *United States,* 282 U. S. 375, 378. A consideration of Section 713 in its application to Section 722, as well as of Section 722, itself, will, we think, demonstrate the fact that the Regulations are not only reasonable, but that they correctly evaluate the Congressional intention. We shall consider the sections in their order, and, in addition to the Tax Court's exposition of them, submit the following:

2. The original Section 713, like the original Section 722, was first added to the Code by Section 201 of the Second Revenue Act of 1940. The portion of Section 713 (e) (1) here in question was added thereto by way of an amendment made by Section 215 of the 1942 Act. There was, therefore, no occasion, prior to the 1942 amendment of Section 713 (e), to construe Section 722 any differently from what we contend it should still be construed, namely, as a relief provision whose every criterion is to be found within its four corners. As stated in our subpoint A, Section 722 was considerably amplified by Section 6 of the Excess Profits Tax Amendments of 1941 and was again amended by Section 222 of the 1942 Act. But, there is nothing in either amendment, or in their legislative history, to warrant a conclusion that Congress intended Section 722 to be differently construed after the

amendment of Section 713 (e) than before. Indeed, the indications are all to the contrary.

As stated, Section 713 provides for the computation of the excess profits credit upon the basis of base period income in the computation of the excess profits tax. It so happens that the taxpayer's actual base period net income was subject to adjustment under Section 713 (e) (1); that is to say, since its 1938 net income was less than 75% of the average of the remaining three years in the base period, 75% thereof was substituted therefor.

As the Tax Court, in its opinion, has demonstrated (R. 34–37) ~~that~~ the average base period net income under Section 713 is a concept limited to the purposes of that section only, no statutory authority appearing for applying the same concept in connection with the relief afforded by Section 722 (R. 35). It would unnecessarily extend this brief to repeat here the Tax Court's argument in support of this conclusion.

3. However, as the Commissioner contended before the Tax Court (R. 32), the basic reason for the invalidity of the taxpayer's contention is that Congress did not, and could not have, intended Section 713 (e) (1) to become a factor in the reconstruction of the taxpayer's base period net income under Section 722, because such method of applying Section 722 does not establish the "fair and just amount representing normal earnings" to be used as a "constructive average base period net income," under Section 722, as required by subsection (a) thereof, and, therefore, that such method furnishes no basis for comparison

between what would be regarded as normal earnings in the base period, as constructed under Section 722 (b) (1), and the actual earnings in that period, as adjusted under Section 713 (e) (1). To state the problem another way, in order to obtain Section 722 relief, a comparison must necessarily be made between the amount of the average base period net income computed under Section 713 and the amount of the constructive average base period net income computed under Section 722. Only if the latter amount is greater than the former is Section 722 relief available.

But the taxpayer's proposed method of constructing base period net income under Section 722 eliminates all necessity for making such comparison, for it purports to construct the base period net income under Section 722 by the use of the mechanism for the computation of the excess profits credit provided by Section 713 (e) (1), including all of the factors involved therein excepting only the amount of the actual net income for the taxable year 1937, for which the amount as constructed under Section 722 (a) is substituted. As a result, moreover, a Section 713 (e) (1) adjustment of the taxpayer's net income for 1938 is made by taking into account 75% of the taxpayer's 1937 net income as constructed under Section 722, instead of 75% of its actual 1937 net income, as Section 713 (e) (1) provides.

Thus the Section 722 constructive average base period net income is merged into the Section 713 (e) (1) adjusted average base period net income; and,

by the same token, it is deprived of its Section 722 (a) function as a comparative. The result is not an excess profits tax credit based upon construction of the taxpayer's base period net income, reflecting what would, except for the abnormalities listed in paragraphs 1 to 4 of Section 722 (b), be regarded as its normal income in the base period years.

The taxpayer has called attention to a graph in Mim. 5807, 1945 Cum. Bull. 273, 274, showing corporation profits in the United States for the years 1918 to 1939, inclusive. From this it will be observed that such profits rose sharply in 1935; remained constant in 1936 and in the first half of 1937; then dropped sharply to a low point in 1938, immediately rising again, however, until they reached the 1936–1937 level in 1939. Obviously, the Section 713 (e) (1) adjustment of the taxpayer's 1938 income, which income was represented as normal in the graph, involves a substitution therefor of an arbitrarily determined larger amount. And, since this amount does not represent the taxpayer's normal earnings, it may obviously not be used as a basis for Section 722 relief. For the purpose of that section is to permit a construction of the taxpayer's base period net income only to the extent of eliminating such abnormalities as are listed in paragraphs 1 to 4, inclusive, of Section 722 (b), which have prevented it from being normal, and the condition which requires the Section 713 (e) (1) adjustment is not one of these.

On the other hand, as regards the year 1937, the taxpayer's income was lower than the normal as repre-

sented in the graph, because of strikes or other interruptions. It is for this reason that a construction thereof was required under Section 722 (b) (1), and such was actually made.

However, similar strikes or interruptions might conceivably also have occurred in 1938, likewise reducing the taxpayer's profits below its normal for that year, as represented in the graph. But, in such case, the construction of those profits under Section 722 would likewise have been of the taxpayer's actual net income in that year, and the amount thereof could not justifiably have been either greater or less than it would normally have been had such strikes or interruptions not occurred. Manifestly, the Commissioner could not under Section 722 have constructed the amount of the taxpayer's income either above or below normal, even though the amount as adjusted pursuant to Section 713 (e) (1) was greater or less than normal. It follows that, in the construction of the taxpayer's net income in any base period year, the normal, or what would, except for abnormalities listed in paragraphs 1 to 4, inclusive, of Section 722, have been the normal income in that year, must be used as a factor under Section 722.

We, therefore, submit that the Tax Court was clearly correct in stating in its opinion that, since the average base period net income under Section 713 is a concept limited to the purposes of that section, and no statutory authority appears for applying it in connection with relief afforded by Section 722 (R. 34–35), Section 713 (e) cannot be "exported" to Section 722

to furnish the only test of a "fair and just amount" or of "normal earnings" to be used as a constructive average base period net income (R. 36–37), and that Section 722 provides that the constructive average base period net income under that section shall in the determination of the tax be used "in lieu of the average base period net income otherwise determined under this chapter," which includes Section 713 (R. 38). Accordingly, the Tax Court correctly concluded (ibid.) that the language of Section 722 (a) indicated there was a difference between constructive average computed under Section 722 and the average determined under Section 713 (e); that it was inescapable that the average constructed under Section 722 must take the place of any average elsewhere determined in the same subchapter, and that nothing but identity of the constructive average base period net income and the average *otherwise* determined under the subchapter could prevent the substitution of the constructive average.

Of course, this is but another way of saying what we have said above, that, contrary to the taxpayer's contention (Br. 46), for purposes of comparison, the taxpayer's average base period net income as adjusted under Section 713 must be placed in juxtaposition with what its "normal earnings" would have been if abnormalities in its actual net income of the kind mentioned in Section 722 (b) had not existed.

Clearly, therefore, there is no justification here for so construing Section 722 as to cast the slightest doubt upon the ~~power~~ purpose of Congress to withhold from the

courts the right to review the Tax Court's determination of any question necessary solely by reason of Section 722.

CONCLUSION

For the foregoing reasons, the petition for review should be dismissed for want of jurisdiction to review the Tax Court's decision under Section 732 (c) of the Code.

Respectfully submitted.

SEWALL KEY,
Acting Assistant Attorney General.

HELEN R. CARLOSS,
CARLTON FOX,
Special Assistants to the Attorney General.

MAY 1947.

APPENDIX

Internal Revenue Code:

SEC. 322. REFUNDS AND CREDITS.

(a) *Authorization.*—Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

(b) *Limitation on allowance.*—

(1) *Period of limitation.*—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

* * * * *

(26 U. S. C. 1940 ed., Sec. 322.)

SEC. 713 [as added by the Second Revenue Act of 1940, c. 757, 54 Stat. 974, Sec. 201]. EXCESS PROFITS CREDIT—BASED ON INCOME.

* * * * *

(d) [as amended by the Excess Profits Tax Amendments of 1941, c. 10, 55 Stat. 17, Sec. 4] *Average base period net income—Determination.*—

(1) *Definition.*—For the purpose of this section the average base period net income of the taxpayer shall be the amount determined under

subsection (e), subject to the exception that if the aggregate excess profits net income for the last half of its base period, reduced by the aggregate of the deficits in excess profits net income for such half, is greater than such aggregate so reduced for the first half, then the average base period net income shall be the amount determined under subsection (f), if greater than the amount determined under subsection (e).

* * * * *

(e) [as amended by the Revenue Act of 1942, c. 619, 56 Stat. 798, Sec. 215] *Average base period net income—General average.*—The average base period net income determined under this subsection shall be determined as follows:

(1) By computing the aggregate of the excess profits net income for each of the taxable years of the taxpayer in the base period, reduced by the sum of the deficits in excess profits net income for each of such years. If the excess profits net income (or deficit in excess profits net income) for one taxable year in the base period divided by the number of months in such taxable year is less than 75 per centum of the aggregate of the excess profits net income (reduced by deficits in excess profits net income) for the other taxable years in the taxpayer's base period divided by the number of months in such other taxable years (herein called "average monthly amount") the amount used for such one year under this paragraph shall be 75 per centum of the average monthly amount multiplied by the number of months in such one year, and the year increased under this sentence shall be the year the increase in which will produce the highest average base period net income;

* * * * *

(26 U. S. C. 1940 ed., Sec. 713.)

SEC. 722 [as added by the Second Revenue Act of 1940, *supra,* Sec. 201]. GENERAL RE-

LIEF—CONSTRUCTIVE AVERAGE BASE PERIOD NET INCOME

(a) [as amended by the Revenue Act of 1942, *supra,* Sec. 222 (a)] *General rule.*—In any case in which the taxpayer establishes that the tax computed under this subchapter (without the benefit of this section) results in an excessive and discriminatory tax and establishes what would be a fair and just amount representing normal earnings to be used as a constructive average base period net income for the purposes of an excess profits tax based upon comparison of normal earnings and earnings during an excess profits tax period, the tax shall be determined by using such constructive average base period net income in lieu of the average base period net income otherwise determined under this subchapter. In determining such constructive average base period net income, no regard shall be had to events or conditions affecting the taxpayer, the industry of which it is a member, or taxpayer generally occurring or existing after December 31, 1939, except that, in cases described in the last sentence of section 722 (b) (1) and in section 722 (c), regard shall be had to the change in the character of the business under section 722 (b) (4) or the nature of the taxpayer and the character of its business under section 722 (c) to the extent necessary to establish the normal earning to be used as the constructive average base period net income.

(b) [as amended by the Revenue Act of 1942, *supra,* Sec. 222 (a)] *Taxpayers using average earnings method.*—The tax computed under this subchapter (without the benefit of this section) shall be considered to be excessive and discriminatory in the case of a taxpayer entitled to use the excess profits credit based on income pursuant to section 713, if its average base period net income is an inadequate standard of normal earnings because—

(1) in one or more taxable years in the base period normal production, output, or operation was interrupted or diminished because of the occurrence, either immediately prior to, or during the base period, of events unusual and peculiar in the experence of such taxpayer.

* * * * *

(a) [as amended by the Act of December 17, 1943, 346, 57 Stat. 601, Sec. 1] *Application for relief under this section.*—The taxpayer shall compute its tax, file its return, and pay the tax shown on the return under this subchapter without the application of this section, except as provided in section 710 (a) (5). The benefits of this section shall not be allowed unless the taxpayer within the period of time prescribed by section 322 and subject to the limitation as to amount of credit or refund prescribed in such section makes application therefor in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. If a constructive average base period net income has been determined under the provisions of this section for any taxable year, the Commissioner may, by regulations approved by the Secretary, prescribe the extent to which the limitations prescribed by this subsection may be waived for the purpose of determining the tax under this subchapter for a subsequent taxable year.

* * * * *

(26 U. S. C. 1940 ed., Sec. 722.)

SEC. 732 [as added by the Excess Profits Tax Amendments of 1941, c. 10, 5 Stat. 17, Sec. 9]. REVIEW OF ABNORMALTIES BY BOARD OF TAX APPEALS.

(a) *Petition to the Board.*—If a claim for refund of tax under this subchapter for any taxable year is disallowed in whole or in part by the Commissioner, and the disallowance relates to the application of section 711 (b) (1) (H),

(I), (J), or (K), section 721, or section 722, relating to abnormalities, the Commissioner shall send notice of such disallowance to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the tax under this subchapter. If such petition is so filed, such notice of disallowance shall be deemed to be a notice of deficiency for all purposes relating to the assessment and collection of taxes or the refund or credit of overpayments.

* * * * *

(c) *Finality of determination.*—If in the determination of the tax liability under this subchapter the determination of any question is necessary solely by reason of section 711 (b) (1) (H), (I), (J), or (K), section 721, or section 722, the determination of such question shall not be reviewed or redetermined by any court or agency except the Board.

* * * * *

(26 U. S. C. 1940 ed., Sec. 732.)

SEC. 1141. COURTS OF REVIEW.

(a) *Jurisdiction.*—The Circuit Courts of Appeals and the United States Court of Appeals for the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board, except as provided in section 239 of the Judicial Code, as amended, 43 Stat. 938 (U. S. C., Title 28, § 346); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended, 43 Stat. 938 (U. S. C., Title 28, § 347).

* * * * *

(26 U. S. C. 1940 ed., Sec. 1141.)

Treasury Regulations 112, promulgated under the Internal Revenue Code:

SEC. 35.722–2. *Constructive average base period net income.—*

* * * * *

(b) *Rules for determination.*—The determination of the constructive average base period net income must depend in each instance upon the facts and circumstances presented by the taxpayer and upon the provisions of section 722 forming the basis of the taxpayer's contention that its excess profits tax is excessive and discriminatory, i. e., if the taxpayer is entitled to use the excess profits credit based on income, the reasons why such credit is an inadequate standard of normal earnings, or if the taxpayer is not entitled to use such credit, the reasons why the excess profits credit based on invested capital is an inadequate standard for determining excess profits. No single test or standard of universal application can be prescribed pursuant to which every taxpayer must establish the fair and just amount representing normal earnings to be used as its constructive average base period net income. However, the following principles and rules must be observed in every case in which a constructive average base period net income is determined:

(1) [as amended by T. D. 5415, 1944 Cum. Bull. 404, 406] Section 722 (a) provides for the determination of a constructive average base period net income to be used in lieu of the actual average base period net income in those cases to which section 722 is applicable. Therefore, in computing such amount a taxpayer is not entitled to use the rules provided by section 713 (e) (1), relating to increase in base period net income of lowest year of base period, or by section 713 (f), relating to average base period net

income in case of increased earnings in last half of base period. Since the constructive average base period net income is the fair and just amount representing normal earnings and will reflect adjustments for abnormally low base period years, a taxpayer having computed such amount is not entitled in addition to apply the rules provided by section 713 (e) (1). In a proper case, however, the principles underlying section 713 (f) relating to growth may be taken into account in arriving at the fair and just amount representing normal earnings if, and to the extent that, the application of such principles is reasonable and consistent with the conditions and limitations of section 722.

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